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In the Supreme Court
OF THE
United States

Supreme Court, U. S.
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OCTOBER TERM, 1949

No. 155

THOMAS H. BRODHEAD, doing business as T. H. Brodhead Co.,
Petitioner,

vs.

WILLIAM BORTHWICK, Tax Commissioner and Tax Collector of the Territory of Hawaii,
Respondent,

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals, for the Ninth Circuit and BRIEF IN SUPPORT THEREOF.

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Subject Index

	Page
Petition for writ of certiorari	1
A. Summary statement of matter involved	2
B. This court has jurisdiction	4
C. The questions presented	6
D. Reasons relied on for allowance of writ	6
Brief in support of petition for writ of certiorari	9
I. Opinions of courts below	9
II. Jurisdiction	10
III. Statement of facts	10
IV. Specification of errors	10
V. Argument	11
First: The Territory of Hawaii cannot lawfully impose a tax on the gross receipts from sales to the United States or its agencies or instrumentalities	11
Second: The Territory of Hawaii cannot lawfully impose a tax at a higher rate with respect to sales to post exchanges than with respect to sales to other retail merchants for resale	17
A. Factually, a practical discrimination exists against post exchanges with respect to their right of purchase	19
B. The Territory, in its purported classification of the tax, has discriminated against post exchanges by making their tax-exempt status, in so far as their sales are concerned, the basis of a higher tax on account of purchases by such stores	22
VI. Conclusion	25

Table of Authorities Cited

Cases Pages

Alabama v. King & Boozer, 314 U. S. 1, 86 L. ed. 3..... 4, 5, 11, 12, 13, 14

Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, 65 L. ed. 1029 23

Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535, 78 L. ed. 1411 23

Curry v. United States, 314 U.S. 14, 86 L. ed. 9..... 11, 13

Freeman v. Hewitt, 329 U. S. 249, 91 L. ed. 265..... 16

Graves v. New York, 306 U. S. 466, 83 L. ed. 927..... 15

Graves v. Texas Co., 298 U. S. 393, 80 L. ed. 1236..... 12, 14

Indian Motorcycle Co. v. United States, 283 U. S. 570, 75 L. ed. 1277 ..... 12, 16

James v. Dravo Contracting Co., 302 U. S. 134, 82 L. ed. 155 ..... 4, 11, 12, 15, 17

Mayo v. United States, 319 U. S. 441, 87 L. ed. 1504..... 5, 15

McLeod v. Dillworth Co., 322 U. S. 327, 88 L. ed. 1305..... 16, 20

New York v. United States, 326 U. S. 572, 90 L. ed. 326.... 24

Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U. S. 218, 72 L. ed. 857 ..... 11, 12, 13, 14, 16

Penn Dairies v. Milk Control Com., 318 U. S. 261, 87 L. ed. 748 ..... 4, 11, 13, 15, 18

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, 72 L. ed. 927 23

Southern R. Co. v. Greene, 216 U. S. 400, 54 L. ed. 536.... 23

Standard Oil Co. of California v. Johnson, 316 U. S. 481, 86 L. ed. 1611 3

United States v. County of Allegheny, 322 U. S. 174, 88 L. ed. 1209 15

Waialua Agricultural Co. v. Christian, 305 U. S. 91, 83 L. ed. 60 12

Statutes

Act 141, Session Laws of Hawaii, 1935, as amended..... 2

28 U.S.C.A., Section 347(a) 10

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Respondent,

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A. SUMMARY STATEMENT OF MATTER INVOLVED.

This is a suit to recover Territorial taxes paid under protest, for the privilege of doing business with the United States, its agencies and instrumentalities.

The General Excise Tax Law of the Territory of Hawaii imposes a tax upon all persons engaged in the business of selling tangible personal property. The tax, during the period in question, was at the rate of 1½% of the gross proceeds of sales of the business, but, in the case of sales to "licensed" retail merchants for purposes of resale, the tax was at the rate of ¼ of 1% of the gross proceeds of sale. (Act 141, Session Laws of Hawaii, 1935, as amended.)

From the time of the said General Excise Tax Law in 1935 until after December 31, 1941, the Territory did not attempt to collect any taxes under said Act with respect to sales of tangible personal property to the United States, its agencies or instrumentalities. (Record, pp. 152-3, 155.) Sales to post exchanges and ships' service stores[1] were sought to be taxed at the rate of ¼ of 1% during this period on the theory, conceded to be erroneous, that they were not agencies or instrumentalities of the United States. (Record, pp. 155-6.)

Commencing as of January 1, 1942, without statutory change, the Territory proposed to collect a tax on sales to the United States (Record, p. 156) and to increase 600% the tax on sales to post exchanges from

[1]Wherever "post exchanges" is used herein, it is meant to include ships' service stores in accordance with the stipulation of the parties hereto. (Record, p. 25.)

¼ of 1% to 1½% (Record, pp. 156-7) on the administrative theory that such sales were not to retail merchants, though they were made for purposes of resale, and that post exchanges were not "licensed retailers" under the law. The reason such stores were not "licensed" was that having been determined to be government agencies,[2] they could not be required to obtain licenses from the Territory to carry on their business. (Record, pp. 24-25.)

Petitioner paid the tax in question under protest, contending, among other things, that (1) the imposition of a tax upon the gross proceeds of sales to the United States is in violation of the Organic Act of the Territory of Hawaii and the Constitution of the United States, and (2) that proceeds of sales to post exchanges cannot be discriminatorily taxed at a higher rate than sales to other retail merchants for the purpose of resale. (Record, pp. 12-14, 22.)

The Supreme Court of the Territory of Hawaii held that a tax upon the gross proceeds of sales to the United States was not in violation of the Organic Act of the Constitution of the United States. The majority of said court also held that a tax at a higher rate upon the proceeds of sales to post exchanges than on other retail merchants for the purpose of resale was not discriminatory. (Record, p. 273.)

Upon appeal, the United States Court of Appeals affirmed the judgment of the Supreme Court of the

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[2]*Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 86 L. ed. 1611 (1942).

Territory of Hawaii, holding, finally, that the construction placed upon the Hawaiian tax statute by the majority of opinion of the Supreme Court of the Territory of Hawaii is not manifestly erroneous and, consequently, such construction must be and is accepted by the United States Court of Appeals as correct. (Record, p. 280.)

B. THIS COURT HAS JURISDICTION.

The Federal Constitutional questions are properly preserved in the record.

This case presents constitutional issues as to the power of a territory to impose a tax with respect to sales to the United States, its agencies or instrumentalities. While it is true that this Court has limited the extent of the immunity from state taxation of various activities of the federal government, this Court, in so doing, has set forth the requirement in all cases that the tax on account of such sales be nondiscriminatory.[3]

The Court of Appeals, in holding the tax nondiscriminatory did so on the basis of the lower court construction, but overlooked the practical consideration of the matter which the claim of discrimination presents. This practical problem becomes clear when

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[3] *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L. ed. 155 (1937);
Alabama v. King & Boozer, 314 U.S. 1, 86 L. ed. 3 (1941);
Penn Dairies v. Milk Control Com., 318 U.S. 261, 87 L. ed. 748 (1943).

presented in the form of a question, namely: If the rate of tax on a vendor is six times as great if he sells tangible personal property to a post exchange for resale than if he sells to another retailer for resale, who is he more likely to sell the goods to, particularly during a period of war-time shortages? The answer appears to be obvious. The discrimination complained of can and does exist by reason of the creation of a condition under which post exchanges encountered difficulties in obtaining merchandise because the seller must pay a higher tax on account of sales to them than on account of sales to other retail merchants for resale. The discrimination complained of also exists against a wholesaler, such as petitioner, the greater portion of whose sales are made to post exchanges, in favor of wholesalers whose entire business is done with other retailers.

The issue as to the validity of a state tax on account of the proceeds of sales to the United States has not been directly determined by this Court. In *Mayo v. United States,*[4] this Court characterized the case of *Alabama v. King & Boozer,*[5] *supra,* which was cited by the Court of Appeals as overruling the "Panhandle doctrine",[6] as one dealing with a tax on purchasers of a supplier of the United States, not as one dealing with a tax on sales to the United States or its agencies and instrumentalities.

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[4]319 U.S. 441, 87 L. ed. 1504 (1943).
[5]314 U.S. 1, 86 L. ed. 3 (1941).
[6]Record, p. 274.

C. THE QUESTIONS PRESENTED.

1. Whether the Territory of Hawaii can constitutionally impose a tax on gross proceeds of sales to the United States.

2. Whether the Territory of Hawaii can constitutionally impose a tax on gross proceeds of sales to post exchanges and ships' service stores for resale at a rate six times that on sales to other retailers for resale.

D. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The decision of the Court of Appeals, with respect to the taxation of proceeds of sales to the United States, by holding such taxable, is a decision of a constitutional question in a way probably in conflict with or, in any event, not supported by applicable decisions of this Court.

2. The decision of the Court of Appeals, as to the discriminatory nature of the tax in its application of a higher rate on account of sales to post exchanges and ships' service stores than with respect to sales to other retailers for resale, holding the same to be nondiscriminatory, is a decision of a constitutional question contrary to the realities of the case, in conflict with the applicable decisions of this Court, and involving a serious question of the relationship of the federal government to the territories.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals

for the Ninth Circuit commanding that court to certify and send to this Court a full and complete transcript of the record and of the proceedings of that court had in the case numbered and entitled on its docket as "No. 11,688, Thomas H. Brodhead, doing business as T. H. Brodhead Co., Appellant, vs. William Borthwick, Tax Commissioner and Tax Collector of the Territory of Hawaii, Appellee;" and that the judgment of said court be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated, Honolulu, T. H.,
June 20, 1949.

Respectfully submitted,

THOMAS H. BRODHEAD, doing business as T. H. Brodhead Co.,

By JULIUS RUSSELL CADES,
Counsel for Petitioner.

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MILTON CADES,
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Respondent,

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

1. The opinion of the Court of Appeals for the Ninth Circuit (Record, p. 272) is reported in 174 F. 2d 21.

2. The opinion of the Supreme Court of the Territory of Hawaii (Record, p. 191) is reported in 37 Haw. 314.

3. The decisions of the Supreme Court of Hawaii on Petition for Rehearing (Record, p. 246), and on Writ of Error After Retrial (Record, p. 186), are reported at 37 Haw. 351 and 37 Haw. 475, respectively.

4. The decision and judgment of the Circuit Court of the First Judicial Circuit, Territory of Hawaii (Record, pp. 98 and 107, respectively), are not reported.

II.

JURISDICTION.

1. The judgment of the Court of Appeals was entered April 11, 1949. (Record, p. 280.)

2. Jurisdiction of this Court is invoked under Judicial Code, § 240, as amended. (28 U.S.C.A., § 347(a).)

III.

STATEMENT OF FACTS.

A statement of facts has been given in the petition and, for that reason, is not repeated here.

IV.

SPECIFICATION OF ERRORS.

The Court of Appeals for the Ninth Circuit erred:

1. In holding that the General Excise Tax Law, imposing a tax on the gross proceeds of sales to the

United States and its agencies and instrumentalities, does not violate the Constitution of the United States.

2. In holding that a tax on sales to post exchanges at a higher rate than on sales to other retailers for resale is not a discriminatory tax in violation of the Constitution of the United States.

3. In holding that the classification, made by the Legislature of the Territory of Hawaii between sales to post exchanges and "licensed retailers", is non-discriminatory and reasonable and not in violation of the Constitution of the United States.

V.

ARGUMENT.

FIRST: THE TERRITORY OF HAWAII CANNOT LAWFULLY IMPOSE A TAX ON THE GROSS RECEIPTS FROM SALES TO THE UNITED STATES OR ITS AGENCIES OR INSTRUMENTALITIES.

The right of the Territory to tax the gross receipts from sales to the United States and to its agencies and instrumentalities is upheld by the Court of Appeals on the ground that this Court had overruled the ban previously promulgated by the *Panhandle*[1] case (Record, pp. 273-4); that with respect to taxation of instrumentalities of the United States, the power con-

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[1] *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 72 L. ed. 857. See *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L. ed. 155 (1937); *Alabama v. King & Boozer*, 314 U.S. 1, 86 L. ed. 3 (1941); *Curry v. United States*, 314 U.S. 14, 86 L. ed. 9 (1941); *Penn Dairies v. Milk Control Com.*, 318 U.S. 261, 87 L. ed. 748 (1943).

ferred by the Organic Act is as great as and no greater than the powers of the states with respect to such taxation (Record, p. 274); that the only question would then be as to the construction of the tax act itself (Record, p. 274); and that the construction placed upon the Hawaiian statute, unless manifestly erroneous, must be accepted as correct[2] (Record p. 275).

It is petitioner's contention that this Court has not directly held that sales to the United States can be taxed by states. The cases cited by the Court of Appeals do not seem to petitioner to be determinative of the issue. In *James v. Dravo Contracting Co.*,[3] this Court said that the *Panhandle* case[4] and *Graves v. Texas Co.*[5] can be distinguished and must be limited to their facts, and, in *Alabama v. King & Boozer*[6] this Court founded its holding on the fact that the purchaser was not the United States or its agency or instrumentality. This Court has held that the *Panhandle* line of cases[4] were overruled in so far as they hold that a tax, the economic burden of which falls on the government, may not constitutionally be imposed by a state. The transaction on account of which the tax was imposed in *Alabama v. King &*

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[2] *Waialua Agricultural Co. v. Christian*, 305 U.S. 91, 83 L. ed. 60 (1938).

[3] 302 U.S. 134, 82 L. ed 155 (1937).

[4] *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 72 L. ed. 857 (1928); *Graves v. Texas Co.*, 298 U.S. 393, 80 L. ed. 1236 (1936); *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 75 L. ed. 1277 (1937).

[5] *Graves v. Texas Co., supra.*

[6] 314 U.S. 1, 86 L. ed. 3 (1941).

Boozer[6] was between a seller of lumber and a purchaser who was a cost-plus contractor with the United States, but not an agency or instrumentality of the United States. It would seem that because of the vital importance of the question—whether the contractor was or was not an agency or instrumentality of the United States—this Court there recognized that if the tax were on a sale to the government or to a government agency or instrumentality directly, the tax would not have been valid under the holdings of the *Panhandle* line of cases.[4] *Curry v. United States*[7] likewise did not determine that sales to the United States are subject to tax. In that case there was involved a use tax on materials purchased by a cost-plus contractor and appropriated to its contract with the government. This Court pointed out that the contractor was not an agent or instrumentality of the government, and that, again, the government was only affected as the economic burden was shifted to it through the operation of a contract. In the case of cost-plus contractors involved in the *King & Boozer*[8] and *Curry*[9] cases, it is the purchase and use of materials by the contractor who is not an agency or instrumentality of the United States that is the subject matter of the tax.

In the *Panhandle* line of cases, as in the present case, it is the acquisition of property by the government, in effect, that was taxed. *Penn Dairies v. Milk*

[7]314 U.S. 14, 86 L. ed. 9 (1941).
[8]*Alabama v. King & Boozer*, 314 U.S. 1, 86 L. ed. 3 (1941).
[9]*Curry v. United States*, 314 U.S. 14, 86 L. ed. 9 (1941).

Control Com.[10] involves the validity of minimum price regulations of the state as applied to the sale of milk by a dealer to the United States. This Court held that this amounts to no greater impairment of a federal right than a tax on sales to contractors with the United States. Petitioner believes that the statement in that case with regard to federal regulations of the War Department, which rest on the reasoning of the *Panhandle Oil*[11] and like cases, which were overruled in *Alabama v. King & Boozer,*[8] refers to the reasoning of those cases that a tax is invalid merely because its burden may be shifted to the United States. A reference back to the *King & Boozer*[8] case will show that this appears to be what this Court meant. There it was said that the asserted right of one (referring to the Federal and State Governments as separate sovereign powers within the same territorial jurisdiction) to be free of taxation by the court, does not spell immunity from paying the additional costs attributable to the taxation of those who furnish supplies to the government and who have been granted no tax immunity, and that so far as a different view has prevailed, as in the *Panhandle*[12] and *Graves*[13] cases, this Court thought it no longer tenable.

In later cases, this Court has made statements showing, in petitioner's opinion, that in each case it recog-

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[10]318 U.S. 261, 87 L. ed. 748 (1943).

[11]*Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218, 72 L. ed. 857 (1928).

[12]*Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218, 72 L. ed. 857 (1928).

[13]*Graves v. Texas Co.,* 298 U.S. 393, 80 L. ed. 1236 (1936).

nized that it was dealing with a transaction different than that subjected to tax in the *Panhandle* line of cases.

In *Mayo v. United States,*[14] this Court, in invalidating a tax on activities of the United States, said that they were not dealing, as in *Graves v. New York,*[15] with a tax on the salary of an employee of the government, or, as in the *King & Boozer*[16] case, with a tax on purchases of a supplier of the United States, or, as in the *Penn Dairies*[17] case, with price control of a contractor with the United States.

In *United States v. County of Allegheny,*[18] this Court characterized the *Dravo*[19] case as concerned with a tax on the benefits of a contractor from dealings with the United States; the *Graves*[15] case as a tax on salaries from it, and said of the *King & Boozer*[20] case that the fact that materials were destined to be furnished to the government does not exempt them from a sales tax imposed on the contractor's vendors. In *United States v. County of Allegheny,*[21] an *ad valorem* tax, imposed on a lessee of the federal government, measured in part by property owned by the

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[14]319 U.S. 441, 87 L. ed. 1504 (1943).
[15]306 U.S. 466, 83 L. ed. 927 (1939).
[16]*Alabama v. King & Boozer,* 314 U.S. 1, 86 L. ed. 3 (1941).
[17]*Penn Dairies v. Milk Control Com.,* 318 U.S. 261, 87 L. ed. 748 (1943).
[18]322 U.S. 174, 88 L. ed. 1209 (1944).
[19]*James v. Dravo Contracting Co.,* 302 U.S. 134, 92 L. ed. 155 (1937).
[20]*Alabama v. King & Boozer,* 314 U.S. 1, 86 L. ed. 3 (1941).
[21]322 U.S. 174, 88 L. ed. 1209 (1944).

government, was held invalid as an undue interference with the government's ownership of its property.

This is but slightly different from the present case, which is an attempted interference with the government's acquisition of pr[illegible]y in the performance of its governmental functions. As was said in the *Indian Motorcycle Co.*[22] case, the sale and purchase constitute a single transaction in which the purchaser is an essential part; no sale is possible without a purchaser, and any tax arising out of the transaction is a tax on the purchaser. In the *Panhandle Oil*[23] case, this Court said that the right of the United States to make purchases is derived from the Constitution. While the state may impose a charge for the privilege of carrying on trade, no tax may be laid on transaction by which the United States secures the things desired for governmental purposes.

In *McLeod v. Dillworth Co.*,[24] this Court characterized a sales tax as a tax on the freedom of purchase—a freedom which war-time restrictions served to emphasize. And, in *Freeman v. Hewitt*,[25] this Court said that a tax on the sale itself is no different than a tax on gross receipts, and that a tax on gross receipts is a direct imposition on the freedom of commercial flow of goods.

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[22] *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 75 L. ed. 1277 (1931).

[23] *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 72 L. ed. 857 (1928).

[24] *McLeod v. Dillworth Co.*, 322 U.S. 327, 88 L. ed. 1305 (1944).

[25] 329 U.S. 249, 91 L. ed. 265 (1946).

There seems to the petitioner sufficient doubt as to the power of states and territories to tax sales to the United States, which is a matter of vital importance to those dealing with the Government, to require this Court to finally determine the matter.

SECOND: THE TERRITORY OF HAWAII CANNOT LAWFULLY IMPOSE A TAX AT A HIGHER RATE WITH RESPECT TO SALES TO POST EXCHANGES THAN WITH RESPECT TO SALES TO OTHER RETAIL MERCHANTS FOR RESALE.

There can be no dispute with the general principle that a state or territorial tax measured by gross proceeds of sale must be nondiscriminatory in so far as sales to the United States or any of its agencies or instrumentalities, including post exchanges, are concerned, in order to be outside the constitutional prohibition.

This Court, in cases in which state taxes imposed with regard to gross receipts from contracts with the United States have been held valid, has repeatedly stated that the tax must be nondiscriminatory in so far as the federal government is concerned, and that the burden on the government must not be greater than that on other taxpayers within the state. For example, in *James v. Dravo Contracting Co.*,[26] this Court said:

> "* * * Respondent has no constitutional right to immunity from *nondiscriminatory*[27] local taxa-

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[26]302 U.S. 134, 82 L. ed. 155 (1937).

[27]Emphasis supplied.

tion and the mere fact that the tax in question burdens respondent is no defense. * * *"

And, in *Alabama v. King & Boozer*,[28] this Court said:

"* * * So far as such a *nondiscriminatory*[29] state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. * * *"

And again, in *Penn Dairies v. Milk Control Com.*,[30] this Court said:

"* * * and the mere fact hat *nondiscriminatory*[29] taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. * * *"

These cases, in laying down the general rule that there is no implied constitution immunity of the government and its agencies from nondiscriminatory state taxation upon persons dealing with them merely because the economic burden thereof may be shifted to the government, by necessary implication must be taken to mean that there is an implied constitutional immunity from discriminatory state taxation. Any

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[28]314 U.S. 1, 86 L. ed. 3 (1941).
[29]Emphasis supplied.
[30]318 U.S. 261, 87 L. ed. 748 (1943).

discriminatory tax directly impedes, retards and burdens the constitutional exercise of the powers of the government in the performance of its functions, and is unconstitutional.

It is the contention of petitioner that, first, there is a factual discrimination against post exchanges which no amount of rationalization can disguise, and, second, that the purported classification of taxpayers under which post exchanges are differentiated from other retail merchants purchasing for resale merely because they cannot be required to procure licenses to engage in business, is an unreasonable one and is aimed directly at such federal agencies for the purpose of collecting from the sellers to post exchanges an additional amount of tax which the Territory is unable to collect on account of sales by such federal agencies.

A. Factually, a practical discrimination exists against Post Exchanges with respect to their right of purchase.

Under the General Excise Tax Act, as construed by the Supreme Court of the Territory of Hawaii and affirmed by the Court of Appeals, the Territory is permitted to tax a wholesaler 1½% upon sales to post exchanges for resale, whereas the sales by the same wholesaler to other retailers for resale can only be taxed at the rate of ¼ of 1%.

No matter by what devious reasoning this result is attempted to be justified, it still does happen that sales to post exchanges are taxed at six times the rate of sales to other retailers for resale, and this results admittedly because the Territory cannot compel post

exchanges to take out licenses and to pay taxes upon their sales. It is true that a number of tax-exempt organizations fall in the same class, but these are all organizations to which the Territory has itself given an exemption, either to lighten their burden for reasons of policy, or by reason of the imposition of some other form of tax in lieu of the General Excise Tax. It seems clear that in such cases, the Territory, having given a tax benefit on one hand, may take it away on the other, or may impose a tax detriment in some other form.[31] However, the tax benefit which post exchanges enjoy, in so far as the freedom of tax on their sales is concerned, is one that arises under the Constitution —not by Territorial legislative sanction—and, hence, the benefit so accruing to such federal agencies cannot be nullified by the Territory.

The tax at a higher rate on account of sales to post exchanges for resale directly interferes with the freedom of purchase of such stores, particularly during war-time when the freedom of purchase is substantially restricted by war-time shortages. This was recognized by this Court in *McLeod v. Dillworth Co.*,[32] where a sales tax was characterized as a tax on the freedom of purchase, which freedom of purchase is a freedom which war-time restrictions serves to emphasize.

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[31]The Territory may classify, in any manner it wishes within the limits of the Fifth or Fourteenth Amendments, so long as it refrains from making the sole basis for imposing higher taxes on one class of taxpayers, such taxpayers' dealings with federal instrumentalities.

[32]322 U.S. 327, 88 L. ed. 1305 (1944).

In the case of post exchanges, because of the imposition of a tax on account of their purchases at a rate six times as high as that imposed on account of purchases of any other purchaser for resale, it must be quite apparent that such federal agencies would and did encounter difficulties in purchasing what they are required to purchase in order to perform their federal functions. It is the interference with this freedom of purchase by reason of the tax at a righer rate of their purchases which constitutes a direct interference with federal functions. This is not a case of mere indirect nondiscriminatory economic burden imposed on a federal agency, but one of practical discrimination which made it more difficult for the federal agency to purchase its requirements. Petitioner does not base his claim upon the relative competitive positions of post exchanges and other retail stores. It is not a case where the burden on the ultimate consumer is to be considered—such considerations are obviously questions of where the economic burden falls. The determination by Congress that the War and Navy Departments could conduct retail stores implies a direction that such stores should not be treated taxwise in a worse manner than other retail stores. The question here presented is whether the Territory can, by imposing a higher rate of tax when a wholesaler sells to post exchanges, in effect make it more difficult for post exchanges to purchase merchandise in the Territory than for other retailers to purchase the same merchandise, and that at a time of war-time shortages when the quantity of merchandise to be purchased was restricted, and, also, at a time when because of war-time

conditions the immediacy of the needs of such federal agencies had to be considered, and were to require such stores to make their purchases on the mainland, with consequent delays of delivery, would have seriously hampered the operations of such stores.

B. The Territory, in its purported classification of the tax, has discriminated against Post Exchanges by making their tax-exempt status, in so far as their sales are concerned, the basis of a higher tax on account of purchases by such stores.

From the evidence, it was apparent that, as construed by the Tax Commissioner, post exchanges were originally treated as retail merchants purchasing for purposes of resale. At that time the Territory was of the opinion that it could tax the sales of post exchanges and, accordingly, imposed a tax on wholesalers selling to post exchanges at the rate of ¼ of 1%. (Record, p. 155.) When it was determined, at least to the satisfaction of the Territory, that the Territory could tax sales to the United States, it chose not to distinguish the two kinds of sales, but chose to treat all sales to the United States as subject to tax at the higher rate of 1½%, although prior to such time it had recognized sales to post exchanges as being properly taxable at the wholesale rate of ¼ of 1%. (Record, pp. 160-1.)

The only reason why purchasing post exchanges are unlicensed under the Act is because they are exempt from taxation on their resales by reason of the Constitution of the United States, and that is the only material respect in which post exchanges differ from other retailers in their activities with respect to sales made by them. The difference in character of sales,

on which the rate is based, must have a reasonable relationship to the purpose of the legislation. The fact that the post exchanges are an arm of the government does not justify any difference in taxes on account of purchases made by them.[33]

As the Excise Tax Act is presently construed, the Act must be regarded as attempting to impose indirectly through increased tax on the immediate sale that which could not be constitutionally imposed on the subsequent resale. In other words, at the time of the imposition of the tax in question, there was no difference in the character of the purchases made by post exchanges and other retailers for purposes of resale. It is only when the Territory considers their relative licensing status in relation to the taxability of their subsequent resale that any distinction can be made. Although there is an illusion of equal treatment when you consider the tax on the purchases by post exchanges and lump together the tax on the purchases by other stores with the tax upon resales, there is not equal treatment, so far as the taxpayer is concerned, at the time of the procurement of the goods by the reselling organization for resale.[34]

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[33]See *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 72 L. ed. 927 (1928); *Southern R. Co. v. Greene*, 216 U.S. 400, 54 L. ed. 536 (1910); *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421, 65 L. ed. 1029 (1921); *Concordia Fire Ins. Co. v. Illinois*, 292 U.S. 535, 78 L. ed. 1411 (1934).

[34]The dissenting Justice of the Territorial Supreme Court expressed this view in part, as follows: "However, it is not for this court to indulge in mathematical speculations or attempt to balance differences in the ultimate overall burdens of purchasers who are substantially the same, but it should confine itself to the question at hand respecting the particular and immediate sales under consideration where there undeniably would be a marked

It is obvious that such a tax places an excessive burden upon the right of purchase of post exchanges that would not be imposed had they not been clothed with a constitutional immunity from Territorial tax, and that the fact thereof directly tends to discourage sales to post exchanges while encouraging those to other retail merchants. It justifies the holding that the Act so construed is unfair in design, favoring retail businesses which are in competition with the government retail businesses in the procurement of merchandise in the Territory for resale. Such an ununiform excise tax law is discriminatory in so far as the exercise of the right of purchase by post exchanges is concerned. As this Court states in *New York v. United States,*[35] "* * * 'discrimination' is not a code of specific but a continuous process of application * * *". Being a continuous process of application, if this Court acquiesces in the exercise by the Territory of power to fix discriminatory rates with respect to sales to post exchanges substantially heigher than with respect to those to other retail merchants, the Territory could fix one still higher and so could the states, thereby effectively expelling post exchanges from territorial and state limits, drying up at its source the

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excess of burden inflicted upon the right of purchase of post exchanges not imposed upon the comparable privilege of other retail merchants nor would it be inflicted had the purchasing post exchanges not been constitutionally exempt. Therein lies the discriminatory character of the assessment in this case, there being at the time of purchase no real or substantial difference nor reasonable or tenable distinction between the actual purchasing character, retail business, purpose and function of buying of post exchanges and those of other retail merchants." (Record pp. 227-8.)

[35]326 U.S. 572, 90 L. ed. 326 (1946).

necessary flow of merchandise and rendering post exchanges unable to purchase merchandise and to function for the purpose for which they were created.

The discrimination complained of is clearly in violation of the Constitution.

VI.

CONCLUSION.

It is respectfully submitted that this is a case calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Dated, Honolulu, T. H.,
June 20, 1949,

Respectfully submitted,
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No. 155

IN THE

Supreme Court of the United States

October Term, 1949

THOMAS H. BRODHEAD, doing business as T. H. Brodhead Co.,
Petitioner,

vs.

WILLIAM BORTHWICK, Tax Commissioner and Tax Collector of the Territory of Hawaii,
Respondent.

BRIEF OF RESPONDENT WILLIAM BORTHWICK, TAX COMMISSIONER OF THE TERRITORY OF HAWAII, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2- 5
SUMMARY OF ARGUMENT	5- 6
ARGUMENT	6-15
I. The Territory of Hawaii lawfully can include in the measure of a privilege tax upon the business of selling tangible personal property in the Territory, the gross proceeds of sales made to the United States, its post exchanges and ships' service stores	6- 8
II. The Territory of Hawaii lawfully can tax the gross proceeds of sales to post exchanges and ships' service stores at 1½%, the same as other sales to the federal and territorial governments, exempt institutions, and consumers	8-15
The facts	8- 9
Avoidance of double taxation as a ground of classification	9-11
The United States in relation to the composite tax structure	11-13
Post exchanges as indistinguishable from other federal departments and agencies	14-15
CONCLUSION	15
APPENDIX	
Excerpts from Act 141 (Series A-44) Session Laws of Hawaii 1935	17-23

TABLE OF AUTHORITIES CITED

Cases

	Page
Alabama v. King & Boozer, 314 U.S. 1	6, 7
Appeal of Fidelity-Philadelphia Trust Co., 354 Pa. 255	11
Chicago v. University of Chicago, 302 Ill. 455	13
Colgate v. Harvey, 296 U.S. 404	11
Compress of Union v. Stone, 188 Miss. 49, cert. denied 311 U.S. 668	5
Cook v. Wilson, 83 Ark. 936, aff'd sub. nom. Wilson v. Cook, 327 U.S. 474	5
Duhame v. State Tax Commission, 65 Ariz. 268	5
Federal Land Bank v. Bismarck Co., 314 U.S. 95	7
Freeman v. Hewitt, 329 U.S. 249	9
Graves v. Texas Co., 298 U.S. 393	6
Great Atlantic & Pacific Tea Co. v. City of Richmond, 183 Va. 931	5
Hammond Lumber Co. v. County of Los Angeles, 104 Cal. App. 235	13
Henneford v. Silas Mason Co., 300 U.S. 577	11
James v. Dravo Contracting Co., 302 U.S. 134	7
Kaiser Co. v. Reid, 30 Cal. 2d 610	13
Madden v. Kentucky, 309 U.S. 83	11
Mayo v. United States, 319 U.S. 441	14
McCullough v. Kammerer Corp., 323 U.S. 327	9
McLeod v. Dillworth Co., 322 U.S. 327	9
Nesbitt v. Gill, 227 N.C. 174, aff'd per curiam 322 U.S. 749	11
Panhandle Oil Co. v. Knox, 277 U.S. 218	6, 7
Penn Dairies v. Milk Control Commission, 318 U.S. 261	6
R.F.C. v. Beaver County, 328 U.S. 204	15
S.R.A. Inc. v. Minnesota, 327 U.S. 558	13
San Pedro R. Co. v. Los Angeles, 180 Cal. 18	13

TABLE OF AUTHORITIES CITED—Continued

Cases

Page

Standard Oil Co. v. Johnson, 316 U.S. 481 ..... 3, 14, 15

Tradesmen's National Bank v. Oklahoma Tax Commission, 309 U.S. 560 12

Trimble v. City of Seattle, 231 U.S. 683 13

United States v. Allegheny County, 322 U.S. 174 14

United States v. Lee, 153 Fla. 94 8

Veatch v. Borthwick, 172 F. 2d 226, cert. denied 337 U.S. 916 14

West Publishing Co. v. McColgan, 27 Cal. 2d 705, aff'd 328 U.S. 823, reh'g denied 329 U.S. 822 11

Western Lithograph Co. v. State Board of Equalization, 11 Cal. 2d 156 5

Wilson v. Cook, 327 U.S. 474 ..... 5, 7

Wood v. Tawes, 181 Md. 155, cert. denied 318 U.S. 788 14

Wood Bros. v. Bagley, 232 Iowa 902 14

Yerian v. Territory, 130 F. 2d 786 14

Statutes

General Excise Tax Law (Act 141, Session Laws of Hawaii 1935) 3

Excerpts printed in Appendix 17-23

Hawaiian Tobacco Tax Act (Act 220, Session Laws of Hawaii 1939) 7

Title 28 of the United States Code

Section 1254 (a) 2

Section 1293 2

Other References

24 Comp. Gen. Dec. 150 8

39 Ops. Atty. Gen. 316 (1939) 7

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, reported 174 F. 2d 21 (R. 272) affirms an opinion of the Supreme Court of Hawaii, reported 37 Haw. 475 (R. 186) which incorporates by reference the opinions of the Supreme Court of Hawaii upon an earlier appeal involving this case and one other case, reported 37 Haw. 314 (R. 191) and 37 Haw. 351 (R. 246).

JURISDICTION

The petition for certiorari seeks review, under section 1254 (a) of Title 28 of the United States Code, of a case which reached the Court of Appeals upon appeal from the Supreme Court of Hawaii under section 1293 of Title 28 (then 28 U.S.C.A. 225).

STATEMENT OF THE CASE

This is a controversy between the petitioner-taxpayer and the respondent-tax commissioner. Neither the United States nor any officer or representative of the post exchanges or ships' service stores has appeared in the controversy in any of its stages, as an amicus curiae or otherwise. During the period in question[1] petitioner correctly returned the amounts of his gross proceeds of sales but (1) claimed for certain of the gross proceeds so disclosed an exemption disallowed by the respondent-tax commissioner, and (2) as to part of the gross proceeds claimed to be exempt, reported the amounts on a line of the return form which, if the claimed exemption were disallowed, would cause the applicable tax rate to be ¼ of 1%; these amounts were reclassified by the respondent-tax commissioner as taxable at 1½%.

Petitioner's first claim, that of total exemption, was based on the theory that all sales to the United States were nontaxable (R. 22-23, 102; Ex. B, R. 27-36). Petitioner's second claim, that part of the amount in controversy should be classified as subject to the ¼ of 1% rate instead of the 1½% rate, was based on an attempted distinction between sales to the post exchanges and ships' service stores of the United States and other federal sales. (R. 22-23, 102; Ex. B, R. 27-36.)

It was stipulated (R. 24) and found (R. 103) that the post exchanges to which petitioner sold were substantially

[1] October, 1942 to March 31, 1944.

similar to those involved in *Standard Oil Co. v. Johnson*, 316 U.S. 481. Hence, these post exchanges are "arms of the federal government engaged in performing government functions as integral parts of the War Departments." (R. 106.) It further was stipulated and found that the ships' service stores have the same relation to the United States Navy as the post exchanges have to the United States Army. (R. 25, 103.) Nevertheless, petitioner seeks to obtain for his sales to the post exchanges and ships' service stores a rate of tax lower than that admittedly applicable to other sales to the War and Navy Departments, if the claimed exemption is denied. (R. 22-23, 102; Ex. B, R. 27-36.)

The General Excise Tax Law of the Territory imposes a privilege tax against persons on account of their business and other activities in the Territory, measured by values, gross proceeds of sale, or gross income, as the case may be. (Sec. 2, Appendix.) The tax falls on the business of a manufacturer, a farmer or other producer, a construction contractor, a theatre or other amusement business, services whether professional or otherwise, and every "business, trade, activity, occupation, or calling" not included in a specific provision of the Act. (Sec. 2, Appendix.) Included in the taxes levied by the statute is a tax upon the business of selling tangible personal property in the Territory measured by the gross proceeds of sales of the business. (Sec. 2 B, Appendix.) This tax, consonant with the all inclusive scheme of the statute, falls on every sale, and is not limited to sales at the retail level. Two rates of tax apply to the business of selling tangible personal property; these rates were 1½% and ¼%, respectively, during the period in question. The application of these rates, as explained in the opinion of the Court of Appeals (R. 277-278), is as follows:

> "Under the Act a 1½% tax is imposed upon 'every person' in the Territory engaged in the business of

selling any tangible personal property computed on the gross proceeds of the sales with certain particular exceptions. The specific exception with which we are here concerned is the exception involving 'wholesaler.'

"The Act, so far as applicable here, section 1, paragraph 10, defines a wholesaler as 'a person doing a regularly organized wholesale or jobbing business * * * and only with respect to * * * (a) sales to a licensed merchant or jobber for purposes of resale;'. Under the Act a 'wholesaler' is only a wholesaler as respects sales to a *licensed retail merchant* for resale. As to other sales, the wholesaler as far as the Act is concerned is just a 'person'. Under such wholesaler exception the proceeds from 'sales to a licensed retail merchant or jobber for purposes of resale' bear a ¼% rate."

(R. 275)

"In substance, the classification of taxpayers for rate purposes under the Act, pursuant to the construction of the Supreme Court of Hawaii, is as follows: Class 1 — (in which appellant falls) 'every person' making sales concerning which there will not be a further tax, either because the sale is one for consumption or one for a resale but on which resale there is, under the Act, no tax liability. Class 2—'wholesalers' as defined by the Act making sales for resale where the resales later would be taxed at 1½%. As to Class 1 the tax rate is fixed at 1½%. In Class 2 the original sale is subject to ¼% tax and the subsequent resale to 1½% tax, or a total for the original and subsequent sale with respect to Class 2 of 1¾%. In such connection the majority opinion of the Supreme Court of Hawaii in this case said:

" 'And the legislature apparently intended that as to each class a different rate of taxation obtain, in the former the rate of one and one-half per cent as sales made by "every person" and in the latter one-quarter per cent as sales made by a "wholesaler". The well-settled rule that the legislature may classify objects for the purposes of taxation has long since received recognition and been applied by this court.'

"In other words the court below has held that Hawaii may, in an excise tax act which taxes every sale, service or other activity, properly avoid the doubling of the tax or its undue pyramiding by prescribing a lower rate where a subsequent taxable activity is to follow. We deem such to be reasonable.

"In Class 1 above-mentioned under the decision of the court below the sales by 'every person' to the federal government, the territorial government, any agency of either, charitable institutions, hospitals, etc., as previously mentioned, are to be taxed at 1½% because each of such buyers, whether buying for consumption or resale are immune from a second tax. In sales by taxpayers in Class 2, to-wit: a 'wholesaler' to a licensed retail merchant, the wholesaler is taxed ¼% and the licensed retail merchant 1½% on resale, which pyramided aggregates 1¾%." (R. 277-278)

Petitioner's statement of the case (R. 2-4) consists largely of a statement of the tax commissioner's administrative practice prior to 1942, a period not involved in this case. The change in administrative practice was due to the correction of two errors (R. 155-163).[2] Such change of administrative practice is without significance.[3]

SUMMARY OF ARGUMENT

I. The Territory of Hawaii lawfully can include in the measure of a privilege tax upon the business of selling tan-

[2] As of January 1, 1942, the tax commissioner determined (1) that gross proceeds of sales to the United States, previously thought to be immune from taxation, were to be included in the measure of the tax, and (2) that post exchanges and ships' service stores, previously thought to be non-government business enterprises, were to be treated as arms of the federal government engaged in performing governmental functions as integral parts of the War and Navy Departments.

[3] *Cook v. Wilson*, 83 Ark. 938, aff'd sub. nom. *Wilson v. Cook*, 327 U.S. 474; *Western Lithograph Co. v. State Board of Equalization*, 11 Cal. 2d 156; *Compress of Union v. Stone*, 188 Miss. 49, cert. denied 311 U.S. 668; *Great Atlantic & Pacific Tea Co. v. City of Richmond*, 183 Va. 931; *Duhame v. State Tax Commission*, 65 Ariz. 268.

gible personal property in the Territory, the gross proceeds of sales made to the United States, its post exchanges and ships' service stores.

II. The Territory of Hawaii lawfully can tax the gross proceeds of sales to post exchanges and ships' service stores at 1½%, the same as other sales to the federal and territorial governments, exempt institutions, and consumers.

ARGUMENT

I.

THE TERRITORY OF HAWAII LAWFULLY CAN INCLUDE IN THE MEASURE OF A PRIVILEGE TAX UPON THE BUSINESS OF SELLING TANGIBLE PERSONAL PROPERTY IN THE TERRITORY, THE GROSS PROCEEDS OF SALES MADE TO THE UNITED STATES, ITS POST EXCHANGES AND SHIPS' SERVICE STORES.

Petitioner takes the position that the *Panhandle* line of cases has not been overruled (Br. pp. 11-17). This issue no longer is an open one. In *Alabama v. King & Boozer*,[4] this Court said that the federal immunity doctrine:

> "* * * does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Knox*, supra; *Graves v. Texas Co.*, supra, we think it no longer tenable."
> (P. 9)

In the later case of *Penn Dairies v. Milk Control Commission*,[5] this Court said that it had overruled the Panhandle line of cases in the *King & Boozer* case. The Court said of certain early opinions of the Comptroller General:

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[4] 314 U.S. 1.
[5] 318 U.S. 261.

"• • • All rest on the reasoning of *Panhandle Oil Co. v. Knox*, 277 U.S. 218, and like cases, which were overruled in *Alabama v. King & Boozer, supra.* • • •"
(P. 277)

The courts below have held (R. 104-105, 187, 193-195, 279) that the tax in question is a tax upon the business of selling tangible personal property in the Territory, measured by the gross proceeds of sales of the business, including all sales made to the United States government, its departments and agencies; that the tax so imposed is a tax upon the petitioner and does not levy a burden upon or interfere with federal activities; and that such tax has only an indirect economic effect upon the United States government, its departments, and agencies. Nowhere in the tax act is the vendor required to collect the tax from the purchaser, or the purchaser made liable therefor.[6] It is noteworthy[7] that the United States to whom the tax immunity is supposed by petitioner to belong, does not claim it.[8]

[6] The tax differs from that involved in *Wilson v. Cook*, 327 U.S. 474, where the tax was required to be collected by Wilson Co. by withholding from the proceeds paid the United States for timber cut. The present case also differs from *Federal Land Bank v. Bismarck Co.*, 314 U.S. 95, where the question before the court was the duty of the federal instrumentality-purchaser to pay a tax construed by the state court as a sales tax laid upon the purchaser.

[7] *James v. Dravo Contracting Co.*, 302 U.S. 134, 158.

[8] The obvious reason for the non-appearance of the United States in this proceeding is that the Attorney General advised the War Department to "take no part in any effort to prevent the collection of the tax [referring to the Hawaiian Tobacco Tax, imposed by Act 220 of the Session Laws of Hawaii 1939] from dealers domiciled in the Territory [of Hawaii] on sales made by them to such post exchanges." 39 Ops. Atty. Gen. 316 (1939). And the Comptroller General has disclaimed interest in the collection of a tax of the type here involved from a vendor selling supplies to the United States, saying:

"• • • the language used by the Supreme Court of the United States in its decision in the case of *Alabama v. King & Boozer*, 314 U.S. 1, leaves no room for doubt that a person who sells supplies to the United States is not—merely because of the immunity of

The tax does not include in its measure any federal activity or property, hence *Mayo v. United States*[9] and *United States v. Allegheny County*[10] are not in point. These cases are discussed in connection with the next point.

II.

THE TERRITORY OF HAWAII LAWFULLY CAN TAX THE GROSS PROCEEDS OF SALES TO POST EXCHANGES AND SHIPS' SERVICE STORES AT 1½%, THE SAME AS OTHER SALES TO THE FEDERAL AND TERRITORIAL GOVERNMENTS, EXEMPT INSTITUTIONS, AND CONSUMERS.

Petitioner asserts that the tax rates work a factual discrimination against post exchanges, having no reasonable basis.

The Facts

The only facts appearing in the record are those recited and treated by the Court of Appeals as follows:

"Under the stipulation of the parties:

> " 'Purchases are made by post exchanges (and ships' stores) both on the mainland and locally, according to the best judgment of the exchange officer,

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the Federal Government from State taxation—exempt from the payment of an otherwise applicable State tax where it appears that the legal incidence of the tax rests upon him as the vendor and not upon the United States as the vendee. * * *"
24 *Comp. Gen. Dec.* 150, 152.

The interest sometimes taken by the United States in the collection of a tax on sales to it has been coupled with the admission that the tax was valid if imposed on the vendor, the United States being concerned only if, under the particular tax law, the legal incidence of the tax fell on the purchaser. *United States v. Lee*, 153 Fla. 94 (1943).

[9] 319 U.S. 441, cited by petitioner, Br. p. 15.

[10] 322 U.S. 174, cited by petitioner, Br. p. 15.

> the delivered cost to the exchange (and ships' stores) being one of the most important factors considered.'
>
> Under such stipulation the burden which appellant claims militates against the post exchange probably, as suggested by the majority opinion below, exists only in theory and not in fact. While almost always the ultimate consumer pays the tax, in the instant situation there exists a reasonable probability that if sellers like appellant endeavored to add the 1½% tax to the price of their goods that the post exchanges and ships' stores would buy direct on the mainland and then themselves have the goods shipped to the post exchanges and ships' stores in Hawaii, thus avoiding any tax at all. That presents a problem of local policy for appellant and the Hawaiian legislature and not for this court."
>
> (R. 279)

Petitioner's assertion of difficulties of the post exchanges in obtaining merchandise [11] is not borne out by the record.[12] There was neither evidence nor findings thereof.[13] To the contrary, the record shows that the dollar volume of sales to post exchanges by petitioner alone during the period October, 1942 to March 31, 1947 was $691,777.66 (R. 6, 21-23, 102).

Avoidance of Double Taxation as a Ground of Classification.

If the statutory classification has a valid purpose, it is not discriminatory. That avoidance of the pyramiding of taxes or double taxation is the purpose of the statutory classification

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[11] Br. pp. 5, 21-22.

[12] See *McCullough v. Kammerer Corp.*, 323 U.S. 327.

[13] It cannot be assumed that war-time conditions intensified the dependence of the post exchanges upon stocks of goods in the Territory (see Br. pp. 21-22), since the War Department had greater resources in obtaining importation of such goods into the Territory than had private businessmen. Petitioner's argument is really a legal one (Br. pp. 16, 20) derived from cases concerning burdens on interstate commerce, such as *McLeod v. Dillworth Co.*, 322 U.S. 327, and *Freeman v. Hewitt*, 329 U.S. 249.

was held by the courts below.[14] The statutory plan is that all sales, as well as other activities, are taxed at 1½%, except those sales which in normal distribution through commercial channels bear two taxes (viz., one when sold at wholesale and one when sold at retail). Only as to those sales is the reduced rate of ¼ of 1% allowed, in order to avoid undue pyramiding of the tax. This leaves subject to the 1½% tax all cases where only single taxation is involved, designated by the courts below as class 1 sales (R. 105-106, 277-278), and including all sales to the territorial and federal governments and agencies thereof, charitable institutions, hospitals, fraternal benefit societies, public utilities, users and consumers, and others not themselves subject to the tax. This class includes all such sales irrespective of whether the goods are sold in wholesale lots or at wholesale prices, and irrespective of whether the goods are intended to be and are resold by the purchasers, or what is done with such goods. The evidence shows as examples of inclusion in this class irrespective of intended resale, sales to: School cafeterias of the Territory of Hawaii; public utilities selling stoves, refrigerators, heaters and the like but not subject to the general excise tax on such resales because of inclusion thereof in public utility business subject to public utility tax; hospitals and other tax exempt institutions; post exchanges and ships' service stores. (R. 157-159, 160-163, 164-167, 278.) In all such cases the second sale actually existed but was disregarded (R. 162-163), causing a single taxable sale to be treated as such, whether the reason was that no further sale would occur or that a further sale would not be taxable.

Avoidance of the pyramiding of taxes or double taxation is a valid purpose; no unconstitutional discrimination results because one class, subject to double taxation, is allowed

[14] See Statement of the Case, *supra*, pp. 4-5.

an exemption or deduction to avoid it, while another class, not subject to double taxation, does not receive it.[15]

The United States in Relation to the Composite Tax Structure.

Petitioner argues that to tax the proceeds of sales made to the post exchanges at 1½% when the "wholesale"[16] rate is ¼% constitutes discrimination against the United States at the time of its procurement of goods. (Br. pp. 23-24.) Curiously, the discrimination against the United States so asserted with respect to sales to post exchanges is not asserted with respect to sales to the United States itself, also taxed at 1½%.

All of the departments of the United States buy in wholesale quantities and hence, in a trade sense, buy in the wholesale market. According to petitioner's argument the fact of purchase in the wholesale market must be given conclusive effect in determining the rate of tax. Classifications clearly permissible and usual in other cases become invalid whenever the United States enters the market, if petitioner's argument is followed to its logical conclusion.

Thus the question is whether sales to the United States must receive a reduced tax rate simply because there are wholesale sales which in consideration of other taxes do receive a reduced tax rate. To argue for this proposition is to set up an arbitrary privilege whereby the indirect interest of the United States in any taxable subject automatically confers upon it, at each stage of the taxing process separately

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[15] *Colgate v. Harvey*, 296 U.S. 404, and cases cited on first point (overruled on second point in *Madden v. Kentucky*, 309 U.S. 83); *West Publishing Co. v. McColgan*, 27 Cal. 2d 705, aff'd 328 U.S. 823, reh'g denied 329 U.S. 822; *Appeal of Fidelity-Philadelphia Trust Co.*, 354 Pa. 255; *Henneford v. Silas Mason Co.*, 300 U.S. 577, 586; *Nesbitt v. Gill*, 227 N.C. 174, aff'd per curiam 332 U.S. 749.

[16] The statutory use of this term, as explained by the courts below, is set forth in the Statement of the Case, *supra*, p. 4.

considered, the most favorable tax treatment allowed to any, irrespective of the composite tax structure. Such is not the law. In *Tradesmen's National Bank v. Oklahoma Tax Commission*,[17] there was involved a franchise tax on a national bank measured by net income. Such a tax was expressly restricted by Act of Congress to a rate not higher than the highest of the rates assessed upon mercantile, manufacturing, and business corporations doing business within the state. National banks were required to *include* in the measure of the tax the interest from tax-immune federal securities as were state banks and Morris Plan companies, but other types of corporations were taxed upon their net income *excluding* interest from tax-immune federal securities. This Court held such was not an invalid discrimination. The issue "turns upon an examination of the whole tax structure of the state," the Court said. The corporations free from net income tax on the revenue of tax-immune federal bonds were required to include those bonds in the value of their capital stock subject to a separate corporate license tax, and with few exceptions, the total taxes paid exceeded the total imposed on national banks. The Court held that:

> "* * * considering all the taxes imposed * * * the scheme of taxation adopted by Oklahoma does not discriminate against national banking associations."
>
> (P. 568)

The courts below followed the same methods. They balanced against the 1½% paid upon a sale to the United States, its post exchanges and ships' service stores, the ¼ of 1% paid upon a sale to a licensed merchant, plus the 1½% added before the goods reach the consumer through taxation of the sale by the merchant, and found that this totaled 1¾%, or more than the tax on the sale to the United

[17] 309 U.S. 560.

States, its post exchanges and ships' service stores. (R. 203, 277-278).

Petitioner attacks the use of this method by the courts below (Br. p. 23). Petitioner seems to forget that it is the burden on the United States which he assails, and that to measure the economic burden by the same yardstick as if it were actually a tax is as favorable consideration of his contention as he can expect. The alternative would be to disregard the economic burden altogether.

Since the composite tax structure is the yardstick, it follows that the power to differentiate in rates upon consideration of other taxes is not one which can be exercised arbitrarily, and petitioner's fear that this power will be used destructively (Br. p. 24) is an imaginary one.

To disregard the composite tax structure would be to overthrow well settled doctrines. It is common for a tax to apply to several different incidents, with a provision that the tax shall be collected only once. For example, it is common to assess real property to the owner of the fee simple, and to also assess a leasehold interest or interest held under a contract of purchase, the tax applying to the latter, however, only when the owner of the fee simple is a tax exempt entity. Thus the composite tax structure is considered. Such taxes have been sustained,[18] and where the United States is the tax exempt owner of the fee simple, taxes against those leasing or purchasing from it are sustained,[19] the same as where a state or municipality is the exempt owner.

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[18] *Trimble v. City of Seattle,* 231 U.S. 683, 689; *Hammond Lumber Co. v. County of Los Angeles,* 104 Cal. App. 235, 247; *Chicago v. University of Chicago,* 302 Ill. 455, 461; *San Pedro R. Co. v. Los Angeles,* 180 Cal. 18.

[19] *Kaiser Co. v. Reid,* 30 Cal. 2d 610; *S.R.A. Inc. v. Minnesota,* 327 U.S. 558.

Post Exchanges as Indistinguishable from Other Federal Departments and Agencies.

Petitioner seeks to distinguish between post exchanges and other federal departments because post exchanges make resales. The Territory, on the other hand, takes the position that all sales to federal agencies and departments must be classed together, along with sales to the Territory of Hawaii and its political subdivisions, sales to consumers, sales to public utilities, and sales to various institutions. The Territory takes the position that it is not obliged to follow the goods into the hands of the United States or take into account the fact that some of its purchases are for resale. If post exchanges, which are "integral parts of the War Department"[20] must be separately classified because they make resales, then equally so, purchases of food stocks by the United States must be followed and separately classified according to whether they go to the commissary or officers' mess for resale, or to the enlisted men's mess for use, and so with many other items.

In making no distinction between sales to the United States for its use and sales for resale by it, the Territory seeks to ignore the federal resale. The Territory is not indirectly reaching and taxing this federal activity,[21] which was the vice of the tax in *United States v. County of Allegheny*[22] and *Mayo v. United States*.[23]

That sales to post exchanges are treated the same as sales to a number of tax exempt entities similarly situated (e.g., public utilities reselling stoves and other appliances, territorial school cafeterias, and hospitals)[24] is met by petitioner with the argument that Congress intended post exchanges to be classified as retail stores (Br. p. 21), that whatever

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[20] *Standard Oil Co. v. Johnson, supra,* 316 U.S. 481.
[21] See Petitioner's Brief, pp. 20-21, 23.
[22] *Supra,* 322 U.S. 174.
[23] *Supra,* 319 U.S. 441.

choice the Territory may have as to the tax classification of others it has no choice here. (Br. p. 20.) Nothing in this Court's holding in *Standard Oil Co. v. Johnson*[25] leads to the conclusion that the Territory is required to classify post exchanges as retail stores, and not as part of the United States government as the Territory has done. This Court has held that a state's power to apply reasonable tax assessment classifications is not impaired merely because some other tax assessment scheme would cost the federal government less. *R.F.C. v. Beaver County.*[26]

[24] Since sales to post exchanges are treated the same as other sales to the United States, and sales to the Territory and others similarly situated, there is no discrimination against the federal government. *Wood v. Tawes,* 181 Md. 155, cert. denied 318 U.S. 788; *Yerian v. Territory,* 130 F. 2d 786, 789-790 (see also *Veatch v. Borthwick,* 172 F. 2d 226, cert. denied 337 U.S. 916); *Wood Bros. v. Bagley,* 232 Iowa 902.

[25] *Supra,* 316 U.S. 481.

[26] 328 U.S. 204.

CONCLUSION

The petition for certiorari should be denied.

DATED at Honolulu, Territory of Hawaii, September 16, 1949.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM ACT 141 (SERIES A-44) SESSION LAWS OF HAWAII 1935, AS AMENDED TO AND INCLUDING THE SESSION LAWS OF HAWAII 1943 (There being no later amendments during the period involved in this case).

Italics indicate provisions added by Act 81 (Series A-54) Session Laws of Hawaii, 1943.

Section 1. *Definitions.* When used in this Act, unless otherwise required by the context:

* * *

(10) "Wholesaler" or "jobber" shall apply only to a person doing a regularly organized wholesale or jobbing business, known to the trade as such, and only with respect to the following sales: (a) sales, to a licensed retail merchant or jobber, for purposes of resale; (b) sales, to a licensed manufacturer, of material or commodities which are to be incorporated by such manufacturer into a finished or saleable product (including the container or package in which the product is contained) during the course of its preservation, manufacture or processing, including preparation for market, and which will remain in such finished or saleable product in such form as to be perceptible to the senses, which finished or saleable product is to be sold and not otherwise used by such manufacturer; or (c) sales, to a licensed contractor, of material or commodities which are to be incorporated by such contractor into the finished work or project required by the contract and which will remain in such finished work or project in such form as to be perceptible to the senses.

* * *

Section 2. *Imposition of tax; rates.** I. There is hereby

* Commencing July 1, 1939 all 1¼% rates were raised to 1½% by order of the Governor, pursuant to subsection III relating to increase or decrease of rates.

levied and shall be assessed and collected annually privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:

A. *Tax on manufacturers.* (1) Upon every person engaging or continuing within this Territory in the business of manufacturing, compounding, canning, preserving, packing, milling, processing, refining or preparing for sale, profit or commercial use, either directly or through the activity of others, in whole or in part, any article or articles, substance or substances, commodity or commodities, the amount of such tax to be equal to the value of the articles, substances or commodities, manufactured, compounded, canned, preserved, packed, milled, processed, refined or prepared, for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same (except as hereinafter provided), multiplied by the respective rates as follows:

Millers or processors of sugar, raw or refined, or sugar by-products, one and one-quarter (1¼) per cent; canneries, one and one-quarter (1¼) per cent; all other manufacturers on whose gross income a tax is not otherwise levied in this Act, one-quarter (¼) of one per cent.

(2) The measure of the tax on manufacturers is the value of the entire product manufactured, compounded, canned, preserved, packed, milled, processed, refined or prepared, in this Territory, for sale, profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the Territory.

(3) If any person liable for the tax on manufacturers shall ship or transport his products, or any part thereof, out of this Territory without making sale of such products, the value of the products in the condition or form in which they existed immediately before entering interstate or foreign

commerce shall be the basis for the assessment of the tax imposed in this section. The commissioner shall prescribe equitable and uniform rules for ascertaining such value; and the tax imposed on manufacturers shall be due and payable as of the date of such entry into interstate or foreign commerce, whether said products have been sold or not. If any person liable for the tax on manufacturers shall ship or transport his products, or any part thereof, outside of the Territory in an unfinished condition, the value of the products or articles in the condition or form in which they existed when shipped or transported out of the Territory and before they entered interstate or foreign commerce shall be the basis of assessment of the tax imposed on manufacturers and the commissioner shall prescribe equitable and uniform rules for ascertaining such value.

(4) In computing the tax levied on manufacturers where the gross proceeds of sales of such manufactured products are taken as the measure of the value of such products for the purpose of computing the tax, if such products shall have been sold on a delivered price, the actual transportation charges prepaid by the taxpayer or included in the invoice price, on such manufactured products, to the place of delivery shall be deducted from the gross proceeds of sales used in determining the amount of the tax.

(5) Provided, however, that any person engaging or continuing in the business of refining sugar in the Territory, who purchases raw sugar for such refining, the seller of which raw sugar is taxable in respect to such sale under section 2, I-A, will be entitled to deduct from the amount of the value used for computing the tax, the amount paid by him for such raw sugar. The refiner shall show in his return the amounts of his purchase of such raw sugar and from whom purchased.

(6) In computing the tax levied under section 2, I-A, any person who by reason of the Agricultural Adjustment Act,

or other Acts of Congress of the United States, includes as a part of his gross income a processing tax, or other similar tax, paid either to the federal or territorial governments, shall be entitled to deduct from the amount of the value used for computing the tax payable under section 2, I-A, hereof, the amount of the processing tax, or other similar tax, paid by him to the federal government; provided, however, that this paragraph shall not be construed to entitle the taxpayer to deduct any sums that may be returned and retained as a benefit payment so-called or a like payment by virtue of the Agricultural Adjustment Act or other Acts passed by the Congress of the United States relating thereto.

B. *Tax on retailers, wholesalers and producers.* (1) Upon every person engaging or continuing within this Territory in the business of selling any tangible personal property whatsoever (not including, however, bonds or other evidence of indebtedness or stocks) there is likewise hereby levied, and shall be assessed and collected, a tax equivalent to one and one-quarter (1¼) per cent of the gross proceeds of sales of the business; provided, however, that in the case of a wholesaler or producer, the tax shall be equal to one-quarter (¼) of one per cent of the gross proceeds of sales of the business.

(2) Provided, that gross proceeds of sales of tangible property in interstate and foreign commerce shall constitute a part of the measure of the tax imposed on retailers and wholesalers, to the extent, under the conditions and in accordance with the provisions of the Constitution of the United States and the Acts of the Congress of the United States which may be now in force or may be hereafter adopted.

(3) Provided, however, that any person engaging or continuing in business as a retailer and a wholesaler or as a retailer and a producer shall pay the tax required on the gross proceeds of sales of each such business at the rates

specified, when his books are kept so as to show separately the gross proceeds of sales of each business; and when his books are not so kept he shall pay the tax as a retailer.

(4) A manufacturer or producer engaging in the business of selling his manufactured products at retail in this Territory shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in this Act, for the privilege of engaging in the business of selling such products at retail in this Territory; and the value, or gross proceeds of sales, of such products, thus sold by the manufacturer or producer at retail and included in the measure of the tax imposed in this Act, shall be deducted from the gross income, or gross proceeds of sales, used in determining the measure of the tax imposed upon such manufacturer or producer as such.

(5) But a manufacturer or producer engaging in the business of selling his products to manufacturers, wholesalers, or licensed retailers, shall not be required to pay the tax imposed in this Act for the privilege of selling such products at wholesale. Nor shall any such manufacturer or producer be required to pay the tax imposed in this Act for the privilege of selling products for delivery outside of this Territory. But the gross income derived from the sale of such products to manufacturers, wholesalers, or licensed retailers, and the gross income derived from all sales of such products, for delivery outside of this Territory, shall be included in determining the measure of the tax imposed upon such manufacturer or producer as such.

(6) *Provided, further, that a taxpayer selling to a federal cost-plus contractor may make the election provided for by paragraph (3) of subsection C, and in any such case the tax shall be computed pursuant to the election, notwithstanding any provision of this subsection or subsection A to the contrary.*

C. *Tax upon contractors.* (1) Upon every person engag-

ing or continuing within this Territory in the business of contracting, the tax shall be equal to one and one-quarter (1¼) per cent of the gross income of the business. Provided, however, that the rate of tax levied upon any such person measured by gross income received on account of uncompleted contracts, entered into prior to the effective date of this Act shall be eight-tenths of one per cent. All contracts shall be prima facie presumed to have been entered into subsequent to the effective date of this Act.

(2) Provided, however, that in computing the tax levied under this subsection C, there shall be deducted from the gross income of the taxpayer, so much thereof as has been included in the measure of the tax levied under subsection C (1) on other taxpayers; but any person claiming such deduction shall be required to show in his return the names of the persons paying the amount deducted hereunder.

(3) *Provided, further, that in computing the tax levied under this subsection C against any federal cost-plus contractor, there shall be excluded from the gross income of the contractor so much thereof as fulfills the following requirements:*

(a) *The gross income exempted shall constitute reimbursement of costs incurred for materials, plant or equipment purchased from a taxpayer licensed under this Act, not exceeding the gross proceeds of sale of such taxpayer on account of the transaction.*

(b) *The taxpayer making the sale shall have certified to the commissioner that he is taxable with respect to the gross proceeds of the sale, and that he elects to have the tax on such gross income computed as if the sale were made to the federal government direct.*

D. *Tax upon theaters, amusements, radio broadcasting stations, etc.* (1) Upon every person engaging or continuing within this Territory in the business of operating a theater, opera house, moving picture show, vaudeville, amuse-

ment park, dance hall, skating rink, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to one and one-quarter (1¼) per cent of the gross income of the business.

(2) Provided, however, that where the rental paid for the use of films in any theater or moving picture house is included in the gross income by which the tax against the lessor of the films is measured under this Act, the amount of rental paid by the lessee operator to such lessor shall be deducted from the lessee operator's gross income used in determining the measure of the tax imposed upon such operator under subsection D (1).

F. *Tax on service business.* Upon every person engaging or continuing within this Territory in any service business or calling not otherwise specifically taxed under this Act, there is likewise hereby levied and shall be assessed and collected a tax equal to one and one-quarter (1¼) per cent of the gross income of any such business.

G. *Professions.* Upon every person engaging or continuing within this Territory in the practice of a profession, including those expounding the religious doctrines of any church, there is likewise hereby levied and shall be assessed and collected a tax equal to one and one-quarter (1¼) per cent of the gross income of such practice or exposition.

H. *Tax on other business.* Upon every person engaging or continuing within this Territory in any business, trade, activity, occupation, or calling not included in the preceding subsections or any other provisions of this Act, there is likewise hereby levied and shall be assessed and collected, a tax equal to one and one-quarter (1¼) per cent of the gross income thereof. This subsection shall apply to the gross income of persons taxable under other subsections hereof not derived from the exercise of privileges taxable thereunder.

* * *